

2002/ melody

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-204025

DATE: November 12, 1981

MATTER OF: Polarad Electronics, Inc.

DIGEST:

1. Where, in a "brand name or equal" solicitation calling for delivery of items A and B or equal, a bidder includes a drawing of its item offered as equivalent to B in the descriptive materials for its item offered as equivalent to item A, the drawing will not render the bid nonresponsive where it is clear under the circumstances that it was included inadvertently, and there is no other indication that it was intended to qualify the bid.
2. An agency's determination that a bidder's descriptive material is sufficient to establish the equivalence of its product under a "brand name or equal" clause will not be disturbed where the protester has submitted no evidence showing that the product in fact is not equivalent to the brand name product or that the agency's determination was otherwise erroneous, and where the descriptive material is not insufficient on its face.

Polarad Electronics, Inc. protests the award of a contract to AUL Instruments, Inc. under invitation for bids (IFB) No. DTFA01-81-B-27531, issued on April 8, 1981 by the Federal Aviation Administration (FAA). The solicitation, a total small business set-aside, sought bids, on a "brand name or equal" basis, on quantities of two Polarad brand name products, a Model 1358A-2 Test Set and a Model 1509-1 Frequency Doubler.

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Of 14 firms solicited, only Polarad and AUL submitted bids by the May 19 bid opening date. Their bids were as follows:

	<u>45 Test Sets</u>	<u>2 Frequency Doublers</u>	<u>Total</u>
AUL	\$430,596.17	\$19,397.58	\$449,993.75
Polarad	483,255	9,970	493,225

The IFB called for a single award; thus AUL was the apparent low bidder on the procurement.

In its bid, AUL offered its Model 7185 Test Set and Model 7186 Frequency Doubler as "equal" to the Polarad brand items. A notation on page six of the IFB provided that bids offering "equal" products "shall include a full description of the product to be supplied in sufficient detail to assure compliance with the salient characteristics requirements * * *." The cover page of the solicitation, Standard Form 33, also contained the following provision:

"BIDDERS MUST FURNISH AS PART OF THEIR BID ALL DESCRIPTIVE MATERIAL (SUCH AS CUTS, ILLUSTRATIONS, DRAWINGS OR OTHER INFORMATION) AS INDICATED IN CLAUSE 39, ENTITLED 'BRAND NAME OR EQUAL' * * *"

Clause 39 of the FAA General Provisions, which is also set forth at Federal Procurement Regulations § 1-1.307-6(c)(1) (Amendment 139, January 1975), states as follows:

"* * * the bidder [offering an equal product] must furnish as part of his bid all descriptive material (such as cuts, illustrations, drawings or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirement of the invitation for bids, and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award."

Responding to these IFB requirements, AUL submitted with its bid written explanations indicating how each of its products met the specifications, and two copies of a line drawing of the front panel of its Model 7186 Frequency Doubler. One copy of the drawing was attached to the descriptive data for Model 7186 and the other was included as part of the descriptive material for Model 7185. Upon discovering this irregularity in AUL's bid at bid opening Polarad protested to the contracting officer that the bid should be rejected as nonresponsive to the IFB's "brand name or equal" clause. The contracting officer thought it clear, however, that AUL had inadvertently included the same drawing in the descriptive materials for both items, and based on the technical officer's finding that the written description of AUL's Model 7185 was itself sufficient to show compliance with the specifications, he denied the protest. Polarad timely filed this protest in our Office on July 14. The FAA made an award to AUL on July 16, however, reportedly prior to receiving notice of the protest.

Polarad contends that inclusion of the drawing of the AUL Model 7186 Frequency Doubler in the descriptive materials for the AUL Model 7185 Test Set rendered AUL's bid nonresponsive since the IFB made the descriptive materials part of the bid and the drawing depicted an item not conforming to the test set specifications. At best, Polarad submits, the drawing made AUL's bid ambiguous as to the product being offered. Polarad concludes that the contracting officer, by disregarding the nonconforming drawing, in effect, made a nonresponsive bid responsive. We disagree and deny the protest.

We have held that the test to be applied in determining the responsiveness of a bid is "whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof." 49 Comp. Gen. 553, 556 (1970); The Entwistle Company, B-192990, February 15, 1979, 79-1 CPD 112. Thus, AUL's inclusion of the wrong drawing in the descriptive materials for its test set does not render its bid nonresponsive so long as it can be determined that AUL's bid unequivocally offers to provide, without exception, a test set conforming to the IFB's terms and requirements.

The question whether a bidder has offered to comply with the terms of a solicitation must be determined from a reasonable interpretation of the entire contents of the bid, including any descriptive literature. Abbott Power Corporation, B-192792, April 30, 1979, 79-1 CPD 295. Here, the FAA determined that, notwithstanding the nonconforming drawing, AUL's bid was an offer to perform in accordance with the IFB.

Both the technical officer and contracting officer concluded that the drawing in question was unintentionally attached to the descriptive materials for AUL's test set. This conclusion was drawn both from the fact that the drawing showed the front panel of AUL's frequency doubler (and was so labeled), the other item under this solicitation, and the fact that this drawing was an exact duplicate of the drawing AUL included in the materials furnished with its bid to describe its frequency doubler. Based on these observations, the contracting officer decided that the drawing warranted no consideration in the evaluation process and he and the technical officer reviewed AUL's written description to determine whether it alone established that AUL's test set conformed to the specifications. The technical officer found that the written description was adequate and the contracting officer thus saw no basis for rejecting AUL's bid. Further, AUL did not take specific exception to any IFB requirements, Interad Ltd., B-182717, June 16, 1975, 75-1 CPD 363, and in our opinion the contracting officer's view as to the probable cause for inclusion of the wrong drawing was, under the circumstances, the only reasonable one. We therefore find that AUL's bid, as a whole, reflected a clear intention to be bound to furnish a product conforming to the specifications, and thus was properly accepted.

These same considerations militate against Polarad's contention that AUL's bid was ambiguous. A bid is ambiguous only when it is subject to two or more reasonable interpretations. Nuclear Research Corporation; Ridgeway Electronics, Incorporated, B-200793, B-200793.2, June 2, 1981, 81-1 CPD 437. AUL's bid is subject to only a single reasonable interpretation--the one adopted by the contracting officer. Polarad would have us rule that by submitting the wrong drawing with its descriptive materials, AUL could have been indicating an intention to supply its frequency doubler in place of its test set. Such an interpretation runs counter to the considerations already discussed and, thus, does not seem reasonable.

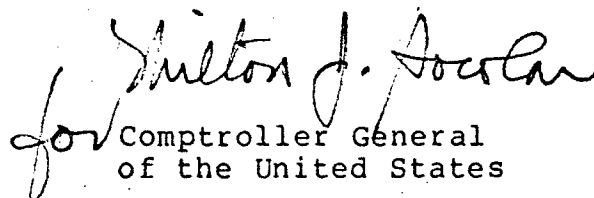
See 48 Comp. Gen. 757 (1969); The Entwistle Company, supra. Thus, we do not believe that AUL's bid was ambiguous.

Polarad also argues that the written description furnished by AUL was no more than a retype of the salient characteristics listed in the IFB, and thus should not have been considered sufficient by itself to establish the equality of AUL's test set. Again, we do not agree.

We have held that where an agency determines that a bidder's descriptive literature demonstrates conformance of offered electronic equipment to the technical requirements of the IFB, our Office will not disturb that determination unless our review of the record demonstrates that the agency's action was either arbitrary or erroneous. Delta Electronic Control Corporation, B-188796, November 28, 1977, 77-2 CPD 412. The "brand name or equal" clause in the IFB, as noted, called for the submission of descriptive material sufficient to allow the FAA to determine "whether the product offered meets the salient characteristics requirement"; the clause did not require that any particular type of data be furnished. The technical officer here specifically determined that AUL's written description of its Model 7185 Test Set, even without the correct drawing, established its equivalence to the brand name (Polarad) test set. Polarad has offered no evidence, beyond its allegation, that AUL's test set did not meet the specifications or that the agency acted arbitrarily in making its determination. The FAA, as mentioned, considered AUL's description of its Model 7185 Test Set to be sufficient, and having reviewed this material we cannot say it is insufficient on its face. We therefore find no basis, on this record, for concluding that AUL failed to establish the equivalence of its test set to that of Polarad.

As part of its requested relief, Polarad claims bid preparation costs. In view of our finding that the agency acted properly and not arbitrarily or capriciously, this claim is denied. See Security Assistance Forces and Equipment International, Inc., B-195196, B-195196.2, July 10, 1980, 80-2 CPD 24.

The protest is denied.


for Comptroller General
of the United States